IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4499 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NATVERLAL PRANJIVANDAS RESHAMWALA & 3 - Petitioner(s)
Versus
HANSABEN AMRATLAL & 1 - Respondent(s)

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Appearance :
MR PV HATHI for Petitioner(s) : 1 - 4.
MR AMIT V THAKKAR for Respondent(s) : 1,
RULE SERVED BY DS for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 31/08/2006

ORAL JUDGMENT

1. By way of filing this petition under Articles 226 and 227 of Constitution of India, the petitioners

have prayed to quash and set aside the order dated 05.07.2003 passed by learned 2nd Jt.Civil Judge (S.D.), Surat, below application Exh.159 and order dated 05.03.2003 passed below application Exh.161 in Special Civil Suit No.372/97 whereby learned Judge granted the prayer to appoint Court Commissioner to record further deposition of the plaintiff's witness and rejected the prayer for playing Video Cassatte on T.V. to enable learned advocate to substantiate his case for disposal of the application for appointment of the Commissioner respectively.

2. It is averred by the petitioners that they are defendant No.1 to 4 in the suit filed by respondent No.1, who is the plaintiff and respondent No.2 is defendant No.5 in the said suit. According to the petitioners, respondent No.1 plaintiff filed the suit claiming reliefs on the ground that on the basis of her forged power of attorney the suit property has been transferred by registered sale-deed to petitioner No.3/defendant No.3 and on that basis, further transfer of the said property was made by way of exchange to petitioner No.2/defendant No.2. It is further averred that the said property was purchased

by husband of respondent No.1/plaintiff along with others. It is also averred that suit is filed challenging those transactions and the suit is at the stage of recording of the evidence and respondent No.1/plaintiff has stepped into the witness box and her part of oral deposition is recorded. During the pendency of recording of her evidence, advocate of respondent No.1/plaintiff gave application Exh.159 without supporting any material or details to appoint a commission to record her remaining evidence as she is unable to appear in the Court because of her sickness or to permit her to file affidavit of remaining deposition as provided under amended provisions of CPC. It is further averred that petitioners/defendants No.1 resisted the application by filing reply Exh.160 inter-alia contending that application was not bona-fide and that the respondent No.1/plaintiff was not sick and therefore, the request for appointment of Commissioner cannot be granted.

3. It is further averred that the petitioners/defendant No.1 to 4 also gave an application Exh.161 and produced Video cassette

contending that respondent No.1/plaintiff is not sick but with a view to save herself from vigour of cross-examination, the application is filed and therefore, petitioners/ defendant No.1 to 4 be permitted to play video cassette on T.V.set.

4. I have heard learned counsel Mr.Hathi for the petitioners and learned advocate Mr.Amit Thakkar for respondent No.1. Notice to Respondent No.2 is served but, has not appeared and is not represented by any advocate.

5. Learned advocate Mr.Hathi for the petitioners submitted that part of the evidence of the plaintiff's witness is recorded and the respondent No.1 / plaintiff gave an application for appointment of commissioner for recording of further evidence only with a view to delay the proceedings. The alleged ground of sickness is not supported by proper medical evidence. He argued that when the court has already started recording the evidence, the Court cannot resort to procedure under Order 18 of CPC and therefore, learned Trial Judge erred in appointing Commissioner to record further evidence of the

plaintiff's witness and therefore, the impugned order requires to be quashed and set aside.

6. Learned advocate Mr.Thakkar for the respondent No.1 submitted that on account of sickness the plaintiff is not in a position to attend the Court and therefore, her remaining part of the evidence is required to be recorded by the Commissioner. He also submitted that under the amended provisions of Civil Procedure Code, the Court has to record the evidence under Order 18 Rule 4 of CPC, and therefore, learned Trial Judge was justified in appointing a commissioner to record the further evidence of the plaintiff's witness. He also submitted that in support of the ground of sickness the respondent No.1/ plaintiff had produced medical certificate and learned Trial Judge relying on the certificate, made appointment of commissioner and therefore, learned Trial Judge has properly exercised discretion and no interference is warranted in the impugned order.

7. It appears from the copy of application Exh.159 filed at Annexure -C with the petition that respondent No.1-plaintiff sought appointment of Commissioner for recording her remaining part of

evidence, as she was sick and unable to appear in the Court for recording of her further deposition. The application also indicates that a request was also made to permit the respondent No.1/plaintiff to file remaining part of her deposition by way of affidavit as provided under amended provisions of Civil Procedure Code. The learned Judge by his impugned order made appointment of Commissioner to record further deposition of the witness relying upon the medical certificate produced by her indicating the sickness. It appears from the reasons assigned by the Trial Court that it relied on a Doctor's Certificate dated 13th January, 2003 which indicated that respondent No.1/plaintiff was suffering from blood-pressure and was under the treatment of doctor from 11.09.2002.

8. In my view, the learned Judge has not appreciated the fact that the certificate did not indicate that patient is in such a state of health that she was not in a position to attend the Court on account of her sickness. Therefore, in my view, learned Trial Judge committed an error in appointing commissioner to record further evidence of the

plaintiff's witnesses on the ground of her sickness. Therefore, the ground urged for appointment of Commissioner is without any cogent or reliable evidence. Therefore, the impugned order is required to be quashed and set aside.

9. As regards, the contention that respondent No.1/ plaintiff may be permitted to file remaining part of examination in chief on affidavit, in my view, the same cannot be permitted as the plaintiff witness has already entered into the witness box and her examination in chief is partly recorded. Rule 4 of Order 18 of CPC provides for the examination in chief on affidavit. However, when part of the deposition of the witness evidence is already recorded by the Trial Court it would not be proper to permit her to file affidavit for examination in chief for remaining part of her deposition, as the same is not provided under the law.

10. Learned advocate for the respondent relied upon the Judgment of the Salemn Advocate Bar Association, Tamil Nadu V/s.Union of India, reported in AIR 2003 SC 189 wherein the Supreme Court held that the Court

has power to decide as to whether evidence of witness shall be taken either by the Court or by the Commissioner. In the facts of the present case, as part of the deposition of the plaintiff's witness has already been recorded the power under Order 18 Rule 4(1) cannot be exercised as far as the evidence of this witness is concerned and therefore, this decision cannot be made applicable to the facts of the present case.

11. As regards, the order passed below Exh.161, in view of the fact that the impugned order below Exh.159 is set aside, the application Exh.161 becomes infructuos and therefore, the order passed below the same does not survive and hence, the same is also required to be quashed and set aside.

12. In view of above, the petition succeeds. The impugned orders passed below Exh.159 and 161 in Special Civil Suit No.372/97 pending before learned 2nd Jt.Civil Judge (S.D.) at Surat are quashed and set aside.

13. The Trial Court shall proceed further with suit from the stage of recording of further evidence of the plaintiff's witness, in accordance with law. Rule discharged. Interim relief if any stands vacated. No costs.

(BANKIM.N.MEHTA, J.)

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